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In the
Supreme Court of the United States
OCTOBER TERM, 1970

No. 951

TEXAS & PACIFIC RAILWAY CO.,
Petitioner,

v.

MRS. THOMAS F. ALLEN, ET AL.,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DEVEREUX & HUTCHINS.

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TEXAS & PACIFIC RAILWAY CO.,
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MRS. THOMAS F. ALLEN, ET AL.,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court of the United States:

Comes now Texas & Pacific Railway Company, as Petitioner, and prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Cir-

cuit rendered August 11, 1970, in the above styled cause, a diversity suit to recover damages for personal injuries which resulted in death.

As grounds for granting its petition, the Petitioner would show the Court as follows:

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at ..... F.2d .....* and is printed in full as Appendix A, infra. No opinion or memorandum was filed by the federal district court which tried the case.

JURISDICTION OF THE COURT

The judgment of the court of appeals was rendered August 11, 1970, and is reproduced as Appendix B, infra.

The petition for rehearing below, timely filed, was denied by order dated September 18, 1970. That order is reproduced as Appendix C, infra.

The jurisdiction of this Court is invoked under *28 U.S.C., §1254 (1).*

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the court of appeals correctly construed and applied the law of the local jurisdiction in holding that Petitioner could not avail itself of Texas' trespasser-licensee doctrine

*As of the time this petition was printed, the opinion below had not yet been officially reported.

(which relieves a landowner of the duty of ordinary care to trespassers or licensees on his property) because the railroad held the property where the accident occurred under an easement rather than in fee simple.

(2) Whether or not the applicable Texas law relative to the duties owed by a railroad to a trespasser upon its right-of-way is embodied in *Phillips Pipeline Co. vs. Razo*, 409 SW 2d 565 (Tex.Civ.App. 1966), reversed 420 SW 2d 691 (Tex.Sup. 1967).

(3) Whether or not the holding of the court of appeals conflicts with holdings of the Supreme Court of Texas regarding the rights and duties owed by a railroad to trespassers injured by conditions upon its right-of-way.

STATEMENT OF THE CASE

A. *The Trial Court Proceedings:*

Respondents brought this suit to recover damages for the death of Thomas Floyd Allen, who was electrocuted during the course and scope of his employment for Rainbo Sign Company as he was attempting to erect an advertising signboard on the right-of-way owned by Petitioner. (R. 1-5, 66.)*

* All "R" references are to the "Appendix" filed in the court below and now certified as the record in this cause by the clerk of that court pursuant to the authority of *Rule 21 (2), Rules of the Supreme Court of the United States.*

On the basis of answers to interrogatories, the pre-trial order, and a supporting affidavit, all of which established that the deceased (and his employer) were without express or implied permission to be on Petitioner's right-of-way on the occasion in question (R. 23, 44, 57-59, 68), the railroad moved for summary judgment on the theory that, under controlling Texas law, it did not owe a trespasser any affirmative duty of care other than to refrain from injuring him willfully or by gross neglect. (R. 54-55.)

After hearing and argument, the motion was granted. (R. 81.)

B. The Facts Pertinent to the Issues Presented:

At the time Thomas Floyd Allen was erecting the signboard on Petitioner's right-of-way (R. 67-68), both he and his employer were trespassers, neither being on the property under the express or implied permission of the railroad. (R. 23, 44, 57-59, 68.)

The electric power line which caused Allen's death was located wholly upon the railroad's right-of-way (R. 68), and the decedent was situated wholly upon Petitioner's property when he came in contact with it. (R. 44, 67-68.)

The land upon which the power line and supporting poles were maintained is owned and occupied by Petitioner under an 1874 conveyance (R. 67), which, for purposes of this appeal, can be

considered to convey a right-of-way or easement for railroad purposes. This right-of-way deed is quoted in the lower court's opinion (Appendix A, page A-5) and is also reproduced in full at R. 18-19.

C. The Decision of the Court of Appeals:

The court of appeals conceded that the decedent was a trespasser on Petitioner's property;* it recognized the general validity of Texas' trespasser-licensee doctrine as applied to owners and occupiers of land; and it admitted that said doctrine, if applicable, would bar this suit.

But, the court found the established doctrine not to be applicable to the facts of this case upon the very tenuous, illusory distinction that Petitioner owned and occupied the property via an easement as opposed to fee ownership, and, for that reason only, it owed all trespassers thereon the affirmative duty of ordinary care. In an apparent attempt to satisfy its duty under *Erie R. Co. vs. Tompkins* the court held that the applicable Texas law controlling this case was embodied in *Phillips Pipeline Co. vs. Razo, supra, 409 SW 2d 565 (Tex.Civ.App. 1966)* — an intermediate appellate court case which, as unbelievable as it may seem, was reversed by the Supreme Court of Texas (420 SW 2d 691), and had been so reversed when the

*Specifically, the court held: "***In the present case, it seems reasonable to assume that the decedent was a trespasser on the land, and that the above rule, if applicable, would bar any recovery.***" (Appendix A, page A-3.)

opinion below was written. Be that as it may, the judgment of the trial court was reversed and remanded for trial on the merits solely because of what the court conceived to be the "directive" of Razo. (Appendix A, page A-7.)

REASONS FOR GRANTING THE WRIT

Texas follows the rule (and has followed it for a very, very long time) that an owner or occupier of land owes no duty to a trespasser or licensee thereon other than to refrain from injuring him intentionally or by gross neglect. *Carlisle vs. J. Weingarten, Inc., 131 Tex. 220, 152 SW 2d 1073, 1074 (1941); Denison Light & Power Co. vs. Patton, 105 Tex. 621, 154 SW 540, 542 (1913); City of Greenville vs. Pitts, 102 Tex. 1, 107 SW 50, 51 (1908); Galveston Oil Co. vs. Morton, 70 Tex. 400, 7 SW 756, 757-758 (1888).*

That rule applies, without exception, to trespassers or licensees injured by some condition upon the right-of-way of a railroad.* *San Antonio & A. P. Ry. Co. vs. Morgan, 92 Tex. 98, 46 SW 28, 29-30 (1898); Dobbins vs. Missouri, Kansas & Texas Ry. Co., 91 Tex. 60, 41 SW 62, 63 (1897); Missouri, Kansas & Texas Ry. Co. vs. Edwards, 90 Tex. 65, 36 SW 430, 431 (1896); Missouri Pacific*

*There is a different rule, not to be confused with the one here relative to *conditions* on land, which imposes upon a railroad the duty of ordinary care, even as to trespassers, in the *operation* of its trains. See *Gulf, C. &S.F. Ry. Co. vs. Russell, 125 Tex. 443, 82 SW 2d 948, 951 (1935).*

Railway Co. vs. Hance, 310 SW 2d 374, 376 (Tex. Civ. App., 1958, writ ref., n.r.e.).

Speaking specifically to the opinion below, there is *no case* in Texas which has conditioned application of the State's trespasser-licensee doctrine upon the character of estate (i.e. fee vs. easement) by which a railroad occupies the property where the injury-causing condition exists.* The reason for this simply is that Texas courts are firmly committed to the proposition that a railroad easement or right-of-way grants the railroad "*** a perpetual easement which for most purposes is as full and complete a dominion over the land itself as that of an owner in fee.***" *Texas & Pacific Ry. Co. vs. Ward County Irrigation District No. 1, 112 Tex. 593, 251 SW 212, 217 (1923); Uvalde Rock Asphalt Co. vs. Asphalt Belt Railway Co., 267 SW 688, 689 (Tex.Com.App. 1925).* For that reason, a Texas railroad is fully entitled to exclude any and all trespassers from its right-of-way or easement, just as could any other land owner. *Fort Worth & D. C. Ry. Co. vs. Craig, 176 SW 827, 829 (Tex. Civ.App., 1915, no writ); Millmen Union vs. Mis-*

*As a matter of fact, the Supreme Court of Texas has held affirmatively that the doctrine does not depend on fee ownership when, in *Hernandez v. Heidenfels, 374 S.W.2d 196 (Tex. Sup. 1963)*, it stated: "*** This rule [the trespasser-licensee doctrine] has been stated in somewhat different language and it is applicable to an occupier of land, who may not be an owner but is entitled to exclusive control thereof,***" (374 S.W. 2d 198.)

As the authorities cited above demonstrate, Petitioner *was* entitled to exclusive possession of its right-of-way, as against the decedent and, at least where the erection of a permanent signboard or other structure is concerned, also against the owner of the fee.

souri-Kansas-Texas Railroad Co., 253 SW 2d 450, 454 *(Tex.Civ.App., 1952, writ ref., n.r.e.)*. Indeed, its dominion is so exclusive that it even includes exclusion of the fee owner in the erection of a permanent structure on the dominant easement. *Olive v. Sabine & E. T. Ry. Co., 33 S.W. 139, 141-143 (Tex. Civ. App., 1895, writ ref.)*. It is that character of possession — i.e., possession which the owner or occupier may presume will not be invaded by one who has no right to be there or by one who may be excvuded therefrom — upon which Texas' trespasser-licensee doctrine operates. See *Galveston Oil Co. vs. Morton, supra, 70 Tex. 400, 7 SW 756, 757-758 (1888)*.

In short there is no exception to Texas' trespasser-licensee to justify the lower court's refusal to apply it in this case.*

Texas Louisiana Power Co. vs. Webster, 127 Tex. 126, 91 SW 2d 302 (1936), about the only case which Respondents can muster for their position, is neither an exception to the trespasser-licensee doctrine nor support for the result below. In that case, the deceased did not violate the defendant's property or, as the court said: "***the power company was not in possession of the land here involved,***. ***It follows that Doc Webster and Bowen Daniels in walking across this land were *not trespassing* or transgressing on the property or property rights of the power company." (91 SW 2d 307, emphasis added.) The defendant there maintained a dangerous condition *outside* the boundaries of its property, and the court only held, in line with holdings in other states, *26 Am.Jur.2d 276, "Electricity, Gas & Steam," 170 (1966)*, that the duty of ordinary care in the maintenance of power lines exists as to a dangerous condition maintained on or over a third party's property even though the injured party is a trespasser as to the third party. That is not the case here where (1) the deceased was a trespasser upon Petitioner's property and (2) the condition which caused death was wholly upon that property, not outside of it.

That the court of appeals would so utterly disregard its *Erie* duty by refusing to follow Texas law is bad enough, but to do so on the pretense that it was operating under the "directive" (Appendix A, p. A-7) of *Phillips Pipeline Co. vs. Razo, supra, 409 SW 2d 565 Tex.Civ.App., 1966), reversed 420 SW 2d 691 (Tex.Sup. 1967),* renders the decision as mischievous as it is erroneous. Along with the obvious distinctions — such as the fact that *Razo* did not involve a surface, railroad right-of-way, but a subterranean pipeline easement; that it did not even involve an owner-trespasser situation at all since the plaintiff was deemed an "invitee"on the premises; and the fact that the quotation from the opinion relied upon below is dictum of the grossest sort — the case's most annihilatory distinction is that it was *reversed* by the Supreme Courtof Texas. Accordingly, *Razo* is no precedent at all, much less precedent for the court of appeal's holding. And, by no means could it overrule the Texas supreme court authority previously quoted as establishing the trespasser-licensee doctrine's application to railroad property. Yet, it is the only case cited to justify that court's aberrant refusal to apply the local jurisdiction's established law.

CONCLUSION

It is incongruous that this court should have to be called upon to review any mundane diversity

case where the only issue is the appropriate local law to be applied; it is even more incongruous here where the controlling law is so easily discernible. But, *Erie R. Co. vs. Tompkins, 58 S.C. 817, 304 US 64, 82 L.Ed. 1188 (1937) makes the correct application of controlling local law in a diversity suit a substantive and inviolate federal right. From the foregoing authorities, there should be no question that, if prosecuted in state court, this case would have to result in summary judgment or instructed verdict for the Petitioner, nor should there be any doubt that the court of appeals' judgment is based upon an erroneous interpretation of local law contrary to decisions of the highest Texas court. It is such variant results *Erie* sought to correct. Since the lower court's judgment, which is premised upon a manifest error, will now become the law of the case by which Petitioner's liability will be fixed, it is submitted that there is no alternative to the protection of this federal defendant's rights but to grant this petition.**

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*Notably, the issue in *Erie* was whether or not to apply the local law which relieved the railroad of the duty of ordinary care to the defendant-licensee on its property.(304 US 70, 82 L.Ed. 1190.)

Therefore, for the foregoing reasons, it is prayed that this petition for writ of certiorari be granted and that, upon final hearing, the judgment of the court of appeals be reversed and that of the trial court affirmed.

Respectfully submitted,

Jack W. Flock

JACK W. FLOCK
Counsel for Petitioner

Of Counsel:
MIKE A. HATCHELL
RAMEY, BRELSFORD, FLOCK, DEVEREUX
AND HUTCHINS

CERTIFICATE OF SERVICE

I certify that three copies each of the foregoing Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Mr. Franklin Jones, Jr., P. O. Drawer 1249, Marshall, Texas, as attorney for Plaintiff, Mrs. Thomas Floyd Allen, et al, and upon Mr. James N. Phenix, P. O. Box 1108, Henderson, Texas, as attorney for John Floyd Allen, et ux, and upon Mr. Brady Coleman, P. O. Box 312, Longview, Texas, as attorney for Intervenor, by placing the same in the United States Mail, properly addressed and postage prepaid, on this the 5th day of November, 1970.

Jack W. Flock

JACK W. FLOCK

APPENDIX A

In the

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 28223

MRS. THOMAS FLOYD ALLEN, ETC.,
Plaintiff-Appellant,

AETNA INSURANCE COMPANY,
Intervenor-Appellant,

versus

TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Texas

(August 11, 1970)

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: Appellants brought suit against the Texas & Pacific Railway Company (hereinafter, the Railroad) for the wrongful death of Thomas Floyd Allen who was electrocuted while erecting a sign on the Railroad's right of way. The district court granted summary judgment for the Railroad. We reverse.

On 9 August 1967, decedent, an employee of Rainbo Sign Company, was a member of a crew erecting a billboard in the vicinity of Terrell, Texas, on the Railroad's right of way. The sign was being located directly beneath high voltage transmission lines maintained by the Railroad. Decedent was killed almost instantaneously when he came into contact with a line carrying 550 volts of electric current. Neither Rainbo Sign Company nor the decedent had express permission to be on the right of way or to erect the road sign thereon.

With jurisdiction grounded in diversity of citizenship,[1] decedent's widow individually and on behalf of their minor child, brought suit in the district court. Aetna Insurance Company intervened seeking recovery of benefits paid under the Texas Workmen's Compensation Act. Decedent's parents intervened to recover contributions lost as a result of his death. Appellants alleged that decedent's death was proximately caused by the Railroad's negligent maintenance of its transmission lines. They specifically alleged that the lines were dangerously low and below the minimum height required by state law.[2] The Railroad moved

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[1]28 U.S.C. § 1332(a) (1) Mrs. Thomas Floyd Allen and Shaundra Lee Allen, the original plaintiffs are citizens of Kansas. The Railroad is a Texas corporation and does business in that state.

[2]Article 1436 of Vernon's Civil Statutes of Texas, provides that power lines,

> . . . shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet. . . .

This provision applies to all power lines. Texas-Louisiana Power Co. v. Webster, 91 S.W. 2d 302 (Tex. 1936); Tri-County Electric Cooperative v. Clair, 217 S.W. 2d 681 (Tex. Civ. App. 1949).

for summary judgment asserting that, at the time of his fatal injury, the decedent was a trespasser or a mere licensee upon its right of way. As a result, the Railroad contended that it owed him no duty except to refrain from affirmatively injuring him. The district court ultimately granted the motion for summary judgment.

The *Erie* question to be resolved is whether the district court properly determined that the Railroad owed the decedent no duty of care which could have been breached in the circumstances of the present case. The Railroad relies on a general proposition of Texas tort law that the owner or occupant of realty is under no obligation to make his realty safe for trespassers or mere licensees; *i.e.* persons coming onto the property without his express or implied invitation. These individuals must take the premises as they find them, and the owner or occupant owes them no duty except to refrain from injuring them willfully, wantonly or through gross negligence.[3]

In the present case it seems reasonable to assume that the decedent was a trespasser on the land, and that the above rule, if applicable, would bar any recovery.[4] However, on the authority of *Texas-Louisiana Power Co. v. Webster*,[5] appellants

[3]Johnson v. Macias, 193 F.2d 475 (5th Cir. 1952); Texas Gas Co. v. Dickens, 168 S.W. 2d 208 (Tex. 1943); Carlisle v. J. Weingarten, Inc., 152 S.W. 2d 1073 (Tex. 1941); 40 Tex. Jur. 2d *Negligence* § 64 (1962).

[4]Our disposition of the case makes it unnecessary to consider the appellants' argument that decedent was not a trespasser.

[5]91 S.W. 2d 302 (Tex. 1936).

contend that the general rule does not apply. In *Webster* three men were killed when they came into contact with a fallen power line while venturing uninvited onto a farm in search of aid for their stalled auto. The Texas Supreme Court held that the power company owed these men a duty of ordinary care, in spite of its conclusion that they were "pure trespassers" on the land. The power company maintained its lines across the farm under an easement from the owner, and the court held that its status was not comparable to that of an owner or occupant of the premises. It stated:

> (T)he power company was not in possession of the land here involved, except for the purposes and with the rights incident to its easement or right of way deed. It had no right under such deed, or under the law, to maintain its wire in the low, sagging condition here shown. In this regard it did not lawfully occupy the space where this wire was hanging, with the consent of the owner.[6]

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[6]91 S.W. 2d at 307.

In a post-submission brief the appellee lays great stress on the contention that the deed to the power company was far more restrictive than the deed held by the appellee. We quote pertinent parts of the power company deed involved in the *Webster* case as set forth in the brief of appellee granting:

> an easement or right-of-way for an electric transmission and distributing line, consisting of variable number of wires, necessary or desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wire, props and guys), at or near the location and along the general course now located and staked out by the said H. Brodhead, his Associates and Assigns, over across and upon the following described described lands,

If, in the present case, the Railroad's power lines were on the property pursuant to an easement to maintain power lines over it, there would be little question that *Webster* would control the outcome. The Railroad has admitted that the fatal line was suspended below the level required by state law.[7] But, the Railroad's rights in the property were derived from a somewhat broader right of way deed granting the company:

> . . . The right-of-way through and over all of our land . . . embracing one hundred feet on each side of the tract of said road and relinquishing the cattleguard, together with the use of the wood, timber and water pertaining to the land so granted and conveyed.[8]

. . .

> Together with the right of ingress and egress over my (our) adjacent lands to or from said right-of-way for the purpose of constructing, reconstructing, inspecting, patroling, hanging new wires on, maintain and removing said line and appurtenances, the right to relocate along the same general direction of said lines; the right to remove from said lands all trees and parts thereof, or other obstructions which endanger or may interfere with the efficiency of said line or its appurtenances; and the right of exercising all other rights hereby granted.

[7]See note 2 *supra*. In answer to appellants' interrogatory the Railroad stated:

> The height of the wires at their lowest point to the ground within an area of 10 feet in all directions from the point where Thomas Allen was killed is 13 feet, 10 inches.

[8]The instrument, contained in the exhibits was given by J. W. Elder and his wife S. E. Elder and bears the date June 5, 1874. Power transmission lines of the kind here involved were surely not in use when this conveyance was executed.

On this basis, the Railroad strongly argues that the situation of the power company in *Webster* is not analogous. There, it contends, the easement granted the company no surface rights, except as might be necessary to sink poles in the ground. According to this argument, the *Webster* plaintiffs could not have been trespassers as to the power company short of climbing its poles or violating its air space.[9] The Railroad contends that, inasmuch as it does have an interest in the surface of the land, it is entitled to benefit from the general "no duty to trespassers" rule. While this narrow reading of *Webster* is possible, the Texas Court of Civil Appeals in *Phillips Pipe Line Co. v. Razo*,[10] stated:

> It seems to be a well settled rule of law in this State than an easement holder, not being in exclusive possession of the land, owes the duty of ordinary care to others who may come on the property, and this duty extends even to others who would be trespassers as to the owner of the fee interest.[11]

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[9] *See* Craig v. Rio Grande Electric Cooperative, 346 S.W.2d 438 (Tex. Civ. App. 1961).

[10] 409 S.W.2d 565 (Tex. Civ. App. 1966), *rev'd on other grounds*, 420 S.W.2d 691 (Tex. 1967). See 40 Tex. Jur. 2d *Negligence* § 64 (Supp. 1969).

[11] 409 S.W.2d at 571, citing: Hernandes v. Heidenfels, 374 S.W.2d 196 (Sup. Ct.); Texas-Louisiana Power Co. v. Webster, 127 Tex. 126, 91 S.W.2d 302; Prairie Pipe Line Co. v. Dalton, 243 S.W. 619 (Tex. Civ. App. writ dis'm); Denton County Electric Co-Op v. Burkholder, 354 S.W.2d 639 (Tex. Civ. Writ Ref. N.R.E.).

In gauging the responsibility of an easement owner to a trespasser by this standard, the critical factor is the nature and extent of the owner's possession.[12] In spite of the broad language of the instrument in question, it conveys a right of way of a designated width over and through the servient estate and hence grants a mere easement to the Railroad.[13] Under the directive of *Razo*, the Railroad owed decedent a duty of ordinary care regardless of his status vis a vis the fee owner. The *Razo* statement appears especially compelling when the rationale behind the "no duty to trespassers" rule is examined. It was explained by the Texas Supreme Court in *Texas Cities Gas Co. v. Dickens.*[14]

> The rule that there is no duty to keep premises safe for trespassers or licensees is for the protection of the property owner. So long as he creates no nuisance, he is entitled to use his property as he sees fit. He is entitled to assume that his possession will not be disturbed by outsiders. It would be placing an unreasonable burden upon him to require that he keep his premises safe for strangers who come uninvited on his land for purposes of their own.

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[12]See Hernandez v. Heldenfels, 374 S.W.2d 196, 200 (Tex. 1963); Jezek v. Texas Power & Light Co., 282 S.W.2d 112, 116 (Tex. Civ. App. 1955).

[13]Wright v. Cherry, 284 S.W.2d 273 (Tex. Civ. Appl 1955); Gulf Coast Water Co. v. Hamman Exploration Co., 160 S.W.2d 92 (Tex. Civ. App. 1942); Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 157 S.W. 737 (Tex. 1913); 21 Tex. Jur. 2d *Easements* § 13 (1961).

[14]168 S.W.2d 208, 210 (Tex. 1943).

By contrast the easement owner is entitled only to the use of the property necessary for the enjoyment of his easement.[15] His rights are generally restricted by the nature of the easement and the terms of the granting instrument. The easement owner's right to use the premises certainly cannot extend to a use which violates the law.[16]

Because it appears that the sole reason the district court granted the motion for summary judgment was its belief that the decedent as a trespasser was owed no duty by the Railroad, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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[15]It is the owner of the servient estate that has full dominion and use of the land insofar as it is not inconsistent with the reasonable enjoyment of the easement. 21 Tex. Jur. 2d *Easements* § 41 (1961).

[16]See Jezek v. Texas Power & Light Co., 282 S.W.2d 112 (Tex. Civ. App. 1955); Texas-Louisiana Power Co. v. Webster, 91 S.W.2d 302 (Tex. 1936).

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1969

No. 28223

D. C. Docket No. CA 1307

MRS. THOMAS FLOYD ALLEN, Etc.,

Plaintiff-Appellant,

AETNA INSURANCE COMPANY,

Intervenor-Appellant,

VERSUS

TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant-Appellee.

Appeals from the United States District Court
for the
Eastern District of Texas

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

B-2

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 11, 1970

Issued As Mandate:

APPENDIX C

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28223

MRS. THOMAS FLOYD ALLEN, Etc.,
Plaintiff-Appellant,

AETNA INSURANCE COMPANY,
Intervenor-Appellant,

versus

TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Texas
(September 18, 1970)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 951

TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

MRS. THOMAS F. ALLEN, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 951

TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

VS.

MRS. THOMAS F. ALLEN, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTION PRESENTED FOR REVIEW

The question here presented for review is whether the well defined principle adopted by the Texas Supreme Court in the *Webster*[1] case properly applies to the facts of the case at bar.

1. *Texas-Louisiana Power Co.* v. *Webster*, 127 Tex. 126, 91 S.W.2d 302 (1936).

STATEMENT OF THE CASE

This case involves the reversal by the Court of Appeals of a summary judgment entered by the District Court against Respondents in a diversity case involving the interpretation of local law. Petitioner's Statement of the Case is correct with the exception of one significant omission. Petitioner operated and maintained *only* an electric power line over the particular area where Thomas Floyd Allen was electrocuted, and at the time of the accident Petitioner admits that the line was maintained at a height in violation of statutory requirements (App. 52, Supp. App. 78; Art. 1436a, *Tex. Rev. Civ. Stat.*).

THE OPINION BELOW

The opinion of the Court of Appeals is reproduced as Appendix A to Petitioner's Brief and is reported at 430 F.2d 982. It correctly applied the applicable Texas law imposing a duty of ordinary care upon anyone who operates electric power lines under a grant of easement as against anyone who might reasonably be anticipated to come in contact with the line, regardless of the technical question of status of the injured party viz-a-viz the fee owner of the realty.

ARGUMENT AND AUTHORITIES

The Webster Rule and Its Evolution

The Court of Appeals operated wholly within the framework of the pronouncements of the Texas Supreme Court in *Webster* when it reversed the summary judgment of the District Court. In view of the strident reliance by Petitioner upon such pre-*Webster* decisions as *Patton*,[2]

2. *Denison Light & Power Co.* v. *Patton*, 105 Tex. 621, 154 S.W. 540, 542 (1913).

Pitts,[3] and *Morton*,[4] we believe a brief analysis of the evolution of *Webster* is in order.

The feudalistically inspired trespasser defense was inculcated into Texas jurisprudence by the court in *Galveston Oil Co.* v. *Morton*.[5] This case involved a situation where the plaintiff was injured when he went upon the premises of the defendant's plant in search of one of the defendant's employees. While wandering around on the premises, the plaintiff stepped into a floor level revolving seed conveyor and was injured. The court held that the owner of the mill was not liable for the plaintiff's injuries on the theory that the owner owed no duty to the plaintiff whom he had neither expressly nor impliedly invited onto the premises of his *lawful* business.

Morton was unwisely expanded to an uninsulated electrical wire in *Pitts*. However, in the wake of results such as *Pitts*, together with an increasing awareness of the propensity of harm of electricity as such, a cleavage of authority developed. Many enlightened jurisdictions over the land came to recognize that one maintaining an instrumentality so insidiously deadly as uninsulated high tension power lines should not be insulated from liability for its misuse simply because the victim could technically be considered a trespasser as to the landowner. For an excellent collation of these cases, we refer to 26 *Am. Jur. 2d* 276, Electricity, Gas & Steam, §70 (1966) and the cases noted therein.

In the mid-1920's Vermont came into the fold via a probing opinion by its Supreme Court in the case of *Humphrey* v. *Twin State Gas & Electric Company*, 100 Vt. 414,

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3. *City of Greenville* v. *Pitts*, 102 Tex. 1, 107 S.W. 50, 51 (1908).

4. *Galveston Oil Co.* v. *Morton*, 70 Tex. 400, 7 S.W. 756 (1888).

5. Id.

139 Atl. 440. The authorities, pro and con, on the subject are analyzed, and the Court then wisely observed:

> "Electricity has come to be a necessary factor in almost all lines of activity. Its usefulness should not be impaired or curtailed. But it is highly destructive when it escapes control; its capacity for harm is but little reduced by distance; it is invisible and undiscoverable; it strikes instantly and without warning. We deem it of the highest consequence, especially in a rural state like ours where hunters, fishermen, and others roam the woods when lawful, almost at will, and where high-tension electric lines run in every direction, and wire fences are in common and increasing use, that those dealing in such a deadly agency should be accountable to all whose likelihood of injury could reasonably be foreseen."

In 1936, the Supreme Court of Texas adopted this principle in *Webster*, thereby creating the exception to the harsh trespasser defense recognized and applied by the Court of Appeals below.

Able counsel for Petitioner rely on a number of non-electrical cases involving property *lawfully* occupied by railroads in order to create the illusion that because Petitioner is a railroad rather than a power company, *Webster* does not apply.[6]

Such cases can afford no comfort for the Petitioner here. The Court of Appeals could have become embroiled in trying to determine if a difference exists under the Texas law in the possessory rights granted under a

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6. *Dobbins* v. *Missouri, Kansas & Texas Ry. Co.*, 91 Tex. 60, 41 S.W. 62, 63 (1897); *Missouri, Kansas & Texas Ry. Co.* v. *Edwards*, 90 Tex. 65, 36 S.W. 430, 431 (1896); *Missouri Pacific Railway Co.* v. *Hance*, 310 S.W.2d 374, 376 (Tex. Civ. App., 1958); *Uvalde Rock Asphalt Co.* v. *Asphalt Belt Railway Co.*, 267 S.W. 688, 689 (Tex. Com. App., 1925); *Ft. Worth & D. C. Ry. Co.* v. *Craig*, 176 S.W. 827, 829 (Tex. Civ. App., 1915, no writ); and *Millmen Union* v. *Missouri-Kansas-Texas Railroad Co.*, 253 S.W.2d 450, 454 (Tex. Civ. App., 1952, writ ref., n.r.e.).

right-of-way easement to a railroad as opposed to electrical power companies. But, in effect, the Fifth Circuit has held that even if such exists, they are differences that do not distinguish. Instead, the Court of Appeals' opinion recognizes and adheres to the underlying policy of the *Webster* decision, and, as the opinion states, this renders it unnecessary to consider whether Allen was a trespasser as to the easement estate in this case.[7]

The entire matter is summed up in *Webster* as follows:

> "The power company under its easement or right of way deed, *and under the law*, had a right to maintain its power line over and on this land, but it had no authority under such deed, *or under the law*, to maintain its line at the point above the ground where this wire was at the time these men were killed by it." 91 S.W.2d 307 (emphasis ours).

The point is that the Petitioner was not a legal occupant of the space where Thomas Floyd Allen met his death. It was making an illegal use of its easement, and the price it pays under the Texas law is deprivation of the trespasser defense.

It is of interest that the seeds of the *Webster* exception to the trespasser defense were borne by its creator. In enunciating the trespasser doctrine in the *Morton* case, the Texas Supreme Court held:

> "The doctrine is established by the above and many other cases that a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another cannot recover damages *unless the contrivance is such that the owner may not lawfully erect or use*, . . ." 7 S.W. at 758 (emphasis ours).

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7. Opinion of the Fifth Circuit of Appeals, footnote 4, 430 F.2d at 984.

The "unless" of *Morton* is precisely what the Petitioner was doing when Allen met his death under the unlawfully maintained electrical transmission lines.

Petitioner clamours loudly over the Court of Appeals' reliance upon the intermediate Texas court's opinion in *Razo*.[8] Suffice it to say that *Razo* was reversed by the Texas Supreme Court by reason of one of that body's not infrequent schizophrenic reactions which have caused some cynics to refer to it as the Texas Supreme Jury.[9] There is not the slightest suggestion by the Supreme Court in its opinion in *Razo* to indicate it disapproved of the quoted portions of the intermediate Texas court's opinion relied upon by the Court below. It simply held that under the law as pronounced by the intermediate Court of Civil Appeals there was no jury issue to be determined.[10]

CONCLUSION

It is indeed incongruous that this Court's valuable time must be consumed in this mundane diversity proceeding. The Court of Appeals has applied the local law precisely in the terms of the utterances of the Texas Supreme Court on this subject. A Summary Judgment would have been no more tenable had this case been filed in the state court as in its present posture. The Court of Appeals' decision correctly interpreted the local law and applied it to the

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8. *Phillips Pipe Line Company* v. *Razo*, 409 S.W.2d 565 (Tex. Civ. App., 1966), rev'd on other grounds, 420 S.W.2d 691 (Tex., 1967).

9. *Earl R. Deen* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 353 U.S. 925, 1 L.Ed.2d 721, 77 S.Ct. 715 and *Jay Lee Gibson* v. *Guy A. Thompson*, 355 U.S. 18, 2 L.Ed.2d 1, 78 S.Ct. 2, reh. den. 355 U.S. 900, 2 L.Ed.2d 197, 78 S.Ct. 258.

10. Contrary to the innuendo in the petition, it should be noted that the Fifth Circuit was not unaware of the Texas Supreme Court's reversal of *Razo* when it cited the intermediate Texas Court's opinion as the applicable law in Texas. See opinion of the Fifth Circuit of Appeals, fn. 10, 430 F.2d at 985.

facts, and the Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Respondents in Opposition was mailed, postage prepaid, properly addressed to Mr. Jack W. Flock, P. O. Drawer 629, Tyler, Texas, Attorney for Petitioner, and upon Mr. James N. Phenix, P. O. Box 1108, Henderson, Texas, as attorney for John Floyd Allen, et ux., and upon Mr. Brady Coleman, P. O. Box 312, Longview, Texas, as attorney for Intervenor this the ..... day of ....., 1970.

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Of Counsel